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Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

JOSEPH KIPLEY, Superintendent of Police of the City of Chicago, ADOLF KRAUS, HEMPSTEAD WASHBURNE and DUDLEY WINSTON, Civil Service Commissioners,

Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS on the relation of EDWARD C. AKIN, Attorney General of the State of Illinois,

Defendant in Error.

Error to Supreme Court of Illinois.

Motion to Dismiss Writ of Error by Defendant in Error and Brief in Support thereof.

EDWARD C. AKIN,
Attorney General of Illinois.

GEORGE W. SMITH,
FRANK P. BLAIR and
MURRY NELSON, Jr.,
Counsel for Defendant in Error.

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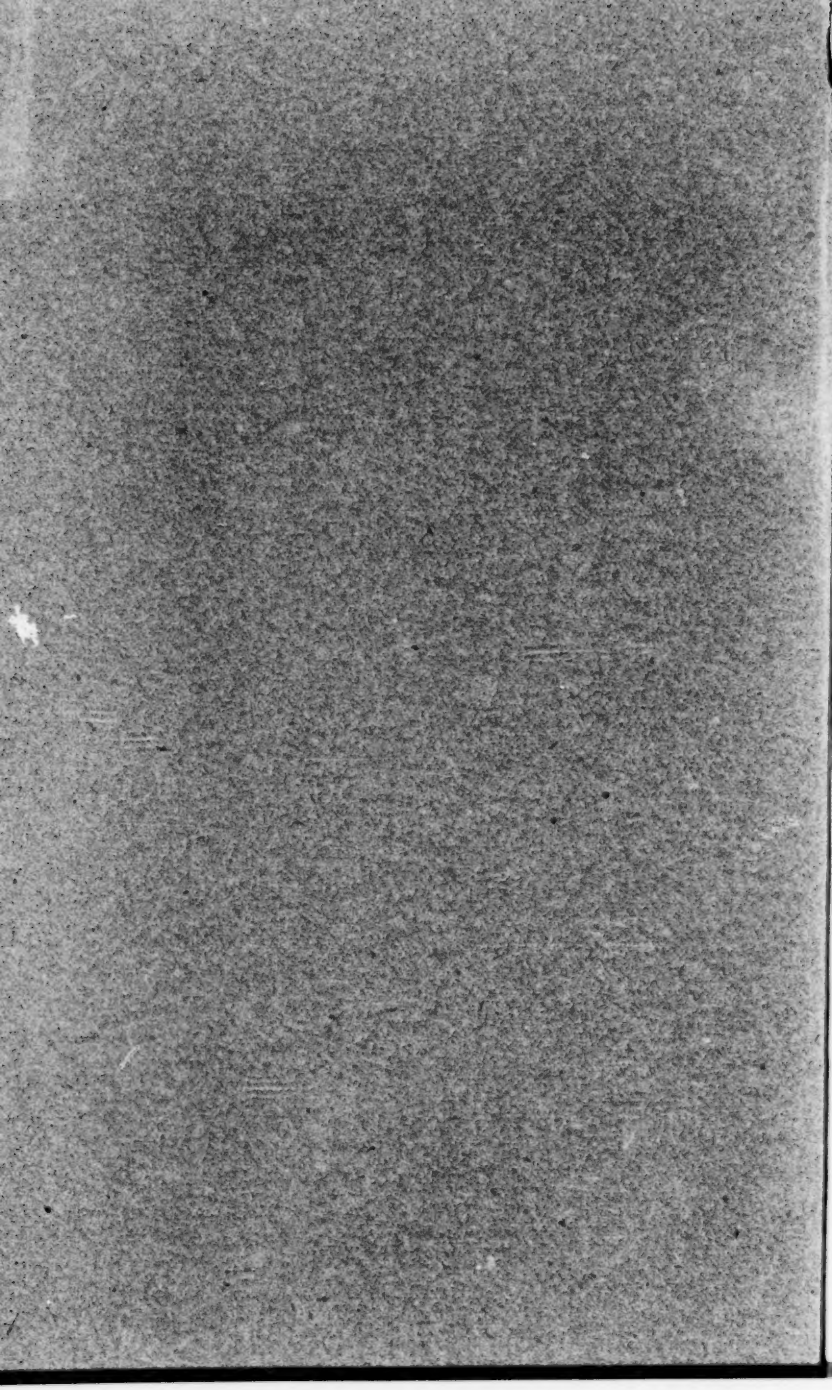

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

JOSEPH KIPLEY, Superintendent of Police, ADOLF KRAUS, HEMPSTEAD WASHBURNE and DUDLEY WINSTON, Civil Service Commissioners,
Plaintiffs in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., EDWARD C. AKIN, Attorney General,
Defendant in Error.

Error to Supreme Court, of Illinois.

And now comes the defendant in error and moves the court that this writ of error be dismissed for the following reasons.

1. Because a Federal question was not involved in the decision of said cause in the Supreme Court of the State of Illinois and did not control the disposition thereof.

2 Because in the decision of said cause in said Supreme Court of Illinois there was not drawn in question the validity of any treaty or statute of, or an authority exercised under, the United States, nor was said decision against the validity of any treaty, statute of, or an authority exercised under the United States.

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3 Because the record does not show that any title, right, privilege or immunity was claimed under the Constitution of the United States, or that the decision was against the title, right, privilege or immunity specially set apart or claimed.

Edward C. Akin
Attorney General of Illinois

George W. Smith
Frank P. Blair
Murry Nelson, Jr.
Counsel for Defendant in Error.

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IN THE

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OCTOBER TERM, A. D. 1897.

JOSEPH KIPLEY, Superintendent of Police of the City of Chicago, ADOLF KRAUS, HEMPSTEAD WASHBURNE and DUDLEY WINSTON, Civil Service Commissioners,
Plaintiffs in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS, on the relation of EDWARD C. AKIN, Attorney General of the State of Illinois,
Defendant in Error.

Error to Supreme Court of Illinois.

The case arises upon a writ of error sued out to the Supreme Court of the State of Illinois, by Joseph Kipley, one of the respondents to an original petition for mandamus filed in that court by the People of the State of Illinois. On the 22d day of December, 1897, an opinion was filed in the office of the clerk of that court, which was as follows:

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STATEMENT.

At the June term 1897, of this court, to wit: on June 1, 1897, the attorney general filed a motion for leave to file an original petition for mandamus. Leave was granted to file the petition, and it was so filed on June 2, 1897.

The petition prays for summons for Joseph Kipley, superintendent of police of Chicago, and Adolf Kraus, Dudley Winston and Hem stead Washburne, civil service commissioners, requiring them to answer the petition.

The petition alleges that vacan ies exist in the positions of assistant superintendent of police, inspectors of police and captains of police; that such positions have not been filled in accordance with the terms of an "Act to regulate the Civil Service of Cities"; that, upon the occurrence of such vacancies, it was the duty of the superintendent of police, as the head of the department of police of the City of Chicago, to notify the Civil Service Commissioners of said city of such vacancies; that, upon such notification it was the duty of said Commissioners to submit to said superintendent of police the names of not more than three applicants in each grade or class next below the grade or class, in which the vacancy existed, for promotion to such vacancies; that said superintendent of police claims the power to fill vacancies in the positions of assistant superintendent of police, inspectors of police and captains of police, in said city; that, in violation of the provisions of this act, said superintendent has

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assumed to fill some of such vacancies by appointing persons not in the classified lists formulated by said Civil Service Commission, and not designated or selected by said Commission for appointment o promotion; that said superintendent has attempted to appoint one Lyman Lewis, as assistant superintendent of police, and one John J. Harkness, as inspector of police. The petition further alleges the passage of the "Act to regulate the Civil Service of Cities" on March 20, 1895, the adoption of the same by the City of Chicago at the general city election held on April 2, 1895, the proclamation of George B. Swift, then mayor of said city, issued on July 1, 1895, declaring the adoption of said act, and that the same was in full force after the date of said proclamation, the appointment by said Swift, as mayor on July 1, 1895, of three Civil Service Commissioners under said act, to wit: John M. Clark, Robert A. Waller and Christoph Hotz, the qualification of said Commissioners, and the adoption by said Commissioners of certain "Civil Service Rules" which rules are appended as an exhibit to said petition.

The petition further alleges, that, on April 6, 1897, Carter H. Harrison was elected mayor of said city as the successor to said Swift, and qualified as such mayor; that, thereafter, said Waller resigned his position as one of said Civil Service Commissioners, and said Clark and Hotz were removed from said Commission by said Carter H. Harrison, mayor; that the respondents, Winston, Kraus and Washburne, were appointed Commissioners in place of said Clark, Waller and Hotz, and have duly qualified and are acting as such Commissioners.

The petition also alleges that the rules of the first

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Board of Commissioners, which were adopted as aforesaid, have not been altered or changed; that, by such rules, the old Board of Commissioners, in the year 1895, classified the offices of assistant superintendent of police, inspectors of police and captains of police, and thereby brought them within the terms and provisions of said Civil Service Act; that, by an opinion in writing addressed to the mayor and signed by the respondents who constitute the present Board of Commissioners, and promulgated on or about May 22, 1897, the positions of assistant superintendent of police and inspectors of police were held by the present Board of Commissioners not to be required to be classified under said act, and to be exempt from the rules and regulations of said commissioners. The petition also sets forth ordinances of the City of Chicago, showing that before, and at the time of, the passage of the Civil Service Act, there was established an executive department of the municipal government of Chicago, known as the department of police, embracing the superintendent of police, and other officials: that there was created the office of superintendent of police, who should be the head of said department of police, and should hold his office for the term of two years, and until his successor should be appointed and qualified. The ordinances referred to in the petition also provide that said superintendent of police shall be appointed by the mayor, by and with the advice and consent of the city council. It is also alleged in the petition, that, prior to the passage of said Civil Service Act, ordinances had been adopted by the city council of Chicago, relating to the department of public works, the department of health and other departments, by which a head of

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each department was established in terms similar to the provisions relating to the department of police. The petition represents that on April 15, 1897, the respondent Joseph Kipley, was by Carter H. Harrison, mayor of said city, appointed superintendent of police and was afterwards duly confirmed by the city council, and qualified as such superintendent, and caused the city to be divided, or accepted a division of the said city theretofore made, into four divisions and fifteen districts, and assigned, or recognized as having been assigned, to each division an inspector of police, and to each district, a captain of police.

The petition prays that a writ of mandamus may issue to said Joseph Kipley, as superintendent of police, directing and commanding him to notify the Civil Service Commissioners of vacancies existing in the positions of assistant superintendent of police, inspectors of police and captains of police in said city, and to said Kraus, Winston and Washburne, as such Civil Service Commissioners, commanding them to submit to said Kipley, as such superintendent of police, the names of not more than three applicants for promotion for each vacancy from the grade next below that in which such vacancy or vacancies exist, etc.

On June 14, 1897, the respondent, Kipley filed a separate answer in which, among other things, he set up that the Civil Service Act was unconstitutional and void. The said answer admits, that the present Civil Service Commissioners, on May 22, 1897, promulgated the opinion mentioned in the petition, holding that the positions of assistant superintendent of police and

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inspectors of police were not required to be classified under said Civil Service Act, and were exempt from the rules and regulations of said Commissioners. The answer avers, that the true construction of the 3d and 11th sections of said act, if the same have any force or validity, is stated in the opinion of May 22, 1897, a copy of which opinion is annexed to the answer and made a part thereof. The answer also adopts and makes a part thereof a certain opinion dated May 5, 1897, given by Charles S. Thornton, corporation counsel of said city, to the said Carter H. Harrison, mayor, therein holding that said positions of assistant superintendent of police, inspectors of police and captains of police and other subordinate positions in the department of public works, of building, of health, of fire and of police, are not required to be classified under said act, and are exempt from its provisions and from the rules and regulations of the Commissioners. The answer of the respondent Kipley, avers that the said respondent has followed the construction of the provisions of said act, as given in the opinions aforesaid.

The answer further sets up, that the respondent neither admits nor denies, that, by the rules referred to in the petition, the first Board of Civil Service Commissioners for the year 1895 classified the offices of assistant superintendent of police, inspectors of police and captains of police, as stated in the petition, but in his answer, the said Kipley positively denies that the said positions were by said rules or could be brought within the terms and provisions of said Civil Service Act. The answer furthermore admits the existence of the vacancies in the department of police referred to in the petition, and that the said respondent, Kipley,

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has caused the same to be filled. On June 15, 1897, the People, by the attorney general, demurred to the answer of the respondent Kipley.

On June 14, 1897, the respondents, Kraus, Washburne and Winston, Civil Service Commissioners aforesaid, filed their answer to the petition, and filed and annexed thereto a copy of the answer filed by them in another proceeding for mandamus instituted against them as Civil Service Commissioners at the same time, at which the present proceeding was instituted, but to which the said Kipley was not made a party defendant. The said Civil Service Commissioners also adopt as part of their answer, the answer filed herein by said Kipley, except so much of Kipley's answer as attacks the validity and constitutionality of said Civil Service Act. The answer of said Commissioners admits the appointment of Lyman Lewis as assistant superintendent of police, and of John J. Harkness, as inspector of police, by the said Kipley, and alleges that, as said Lewis and Harkness are not made parties to the petition, the petition is defective.

The answer of the respondents Kraus, Winston and Washburne, in the mandamus proceeding, commenced against them alone and without joining Kipley, and which is made a part of their answer in the present proceeding, refers to and indorses and adopts the said opinion promulgated by them and addressed to the mayor on May 22, 1897. The answer of the Commissioners, by the adoption of said opinion, and of their answer in the other proceeding, claims that certain positions in the police, fire and health departments, and in the depart-

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ment of buildings, and of public works, in the City of Chicago, other than the heads of those departments, as mentioned in the ordinances referred to in the petition are not required to be classified under the Civil Service Act, and are exempt from its provisions. The positions claimed by the Commissioners in their answer to be thus exempt and not subject to classification, are in the department of public works, the following positions, to wit: secretary to commissioner of public works, city engineer, superintendent of streets, superintendent of water, superintendent of sewerage, superintendent of special assessments, superintendent of maps; in the department of buildings, secretary to commissioner of buildings, deputy commissioner of buildings; in the department of health, assistant commissioner of health; in the department of police, secretary of the department of police, assistant superintendent of police, inspector of police; in the fire department, first assistant fire marshal, superintendent of city telegraph, fire inspector, secretary of fire department, etc. On June 15, 1897, the People, by the attorney general, filed a demurrer to the answer of the respondents who are Civil Service Commissioners.

Subsequently after the adjournment of this court in the June term, 1897, and on the 28th day of June, A. D. 1897, the City Council of the City of Chicago passed an ordinance entitled "An ordinance to designate certain public officials who shall be selected by the mayor with the concurrence of the council," which ordinance is as follows:

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"Be it ordained by the City Council of the City of Chicago:

Section 1. That the following list of public officials shall be designated as 'heads of principal departments' as said term is used in section 11 of an 'act to regulate civil service of cities,' approved and in full force March 20th, 1895, and shall be nominated by the mayor and shall be confirmed by the city council, viz: city engineer, superintendent of streets, superintendent of water, superintendent of sewerage or sewers, superintendent of special assessments, superintendent of water pipe extension, superintendent of city pipe yards, secretary of police department, assistant superintendent of police, fifteen captains of police, four inspectors of police, chief sidewalk inspector, assessor of the water department, district foreman of street repairs, district foreman of water pipe extension, district foreman of sewer cleaning, district foreman for street cleaning.

Section 2. All ordinances or parts of ordinances inconsistent herewith are hereby repealed.

Section 3. This ordinance shall take effect and be in force from and after its passage." This ordinance was approved by the mayor, Carter H. Harrison, on July 1, 1897.

On July 10th, 1897, the respondent Joseph Kipley superintendent of police, filed a plea in this court, setting up that, since the filing of his answer to the petition herein and since the last adjournment of the court, the city council of Chicago had adopted the said ordinance of June 28th, 1897. The plea then sets forth said last mentioned ordinance in full, and alleges

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that the same is in full force and effect, and that thereby the respondents' failure to notify said Civil Service Commissioners and to submit to them the appointment of certain subordinate police officers of said city have been, if they ever were within the same, wholly taken away from and removed out of the control, jurisdiction and power of the said Civil Service Commissioners and that such matters are now expressly excepted by the terms of said ordinance from the force and effect of the Civil Service Act. The plea then quotes in full sections 3 and 11 of said act, and submits said last named ordinance to the court to be read and construed in view of said sections. On October 18th, 1897, the attorney general filed a demurrer to said plea.

OPINION BY MAGRUDER, J.

First. The Civil Service Commissioners who are respondents in this case, do not set up in their answer the unconstitutionality of the Civil Service Act, nor do they adopt that part of the answer of the respondent Kipley, the superintendent of police, which attacks the constitutionality of the law. But the respondent, Kipley, in his answer, expressly alleges, that the act is unconstitutional, and relies upon its unconstitutionality as a defense to the matters and things set up in the petition. By the demurrer filed by the petitioner to the answer of Kipley, the question of the constitutionality of the law is directly raised. The plea filed on July 10th, 1897, setting up the ordinance of June 28th, 1897, is a plea *puis darrein continuance.* That plea relies upon the ordinance of June 28th, 1897, as a

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defense, and, under the technical rules applicable to such a plea, it may be that the defenses set up in the answer of Kipley are superseded and the substantive averments of the petition confessed It has been held that, where a plea *puis darrein continuance* is filed, everything is confessed except the matter contested by the plea. (City of East St. Louis v. Renshaw, 153 Ill., 491.) In this view it would seem to follow that the question of the constiutionality of the law, as raised in the answer of Kipley, has been waived by the filing of the plea *puis*. Counsel for the respondent Kipley, insists that in an original proceeding by mandamus in this court, the question of the constitutionality of the act can be raised at any time before the issuance of the peremptory writ, irrespective of the filing of the plea *puis darrein continuance*.

He contends that the court will not in such a proceeding enforce by mandamus an unconstitutional law, if, at any time in the progress of the proceedings such unconstitutionality is made apparent and is brought to the attention of the court. This contention receives some support from the following remark made by this court in People v. Town of Mt. Morris, 145 Ill., 427: "It has been held that defects in substance in the petition may be taken advantage of at any time before granting the peremptory writ." Without determining, however, whether the contention thus made by counsel is absolutely correct or not, we deem it proper to dispose of the question of the constitutionality of the act, in view of the fact that the counsel for the respondent Kipley, furnishes us with an elaborate argument against its constitutionality, and the

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petitioner, and the respondents, who are Civil Service Commissioners, present equally elaborate arguments in favor of its constitutionality. The subject is thus urged upon our attention by all the parties to this controversy.

The Civil Service Act passed by the legislature of this state on March 20th, 1895, is not the first law of its kind which has appeared in this country. Such a law has been passed by the Congress of the United States to be applied to the Civil Service under the Federal government. Statutes of the same kind have also been adopted in the States of Massachusetts and New York. The Civil Service Law, which was in force in the State of New York for more than ten years before the year 1894, had so commended itself to popular approval, and had been so beneficent in its results, that its underlying principle was embodied in the new or amended and revised constitution of that state, adopted by the people in 1894, and which went into effect on January 1st, 1895.

The provision upon this subject in the New York Constitution of 1894 is as follows: "Appointments and promotions in the Civil Service of the state and in all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which so far as practicable, shall be competitive * * * Laws shall be made to provide for the enforcement of this section."

The evils sought to be remedied by legislation of this character, are well known and well understood. These evils are such as grow out of what is generally

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called the "spoils system" in the matter of appointments to public office. This system rests upon what Mr. Justice Peckham, now of the Supreme Court of the United States, then a member of the Court of Appeals of the State of New York, speaking for the latter court in Rogers v. Common Council of Buffalo, 123 N. Y., 173, calls "the semi-barbarous maxim, that to the victor belong the spoils." Under the system thus designated as the "spoils system," party service and party fealty are made the tests for appointments to office. Wherever this system prevails, political work, done by the applicant, and his supposed power to do more, are regarded as the chief reasons for his appointment to office. Public office is thus made to be the reward for political work. All the offices are "parcelled out by the chiefs of the victorious party to the faithful followers in recognition of past political services, or in expectation of future support of the same nature. Possession of office, under such a system, is to be the reward of party fidelity and party service." (Rogers v. Common Council, of Buffalo, *supra.*) Where an appointment is made under the system in question, the officer making it is apt to ignore any sense of personal or official responsibility to the people, and to substitute in its stead a feeling of responsibliity to his party only. The appointments to offices are such as the leading men therein choose to ask for. (Rogers v. Common Council of Buffalo, *supra.*) Where Civil Service laws have been adopted, they have been so adopted for the purpose of doing away with the evils which necessarily result from "the spoils system." Those evils have been fitly characterized as inefficiency, extravagance, the interruption of public busi-

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ness by place hunters, corruption of the electoral franchise, and political assessments. A distinguished writer on the Constitutional History of the United States has spoken of the maxim "to the victor belong the spoils being an inviolable principle of American politicians," and he says: "It is owing only to the astonishing vitality of the people of the United States and to the altogether unsurpassed and unsurpassable favor of their natural conditions, that the state has not succumbed under the onerous burden of the curse. (2 Von Holst, Const. Hist. of U. S., 26.) To do away with the onerous burden of this curse in the cities of Illinois, the Act of March 20th, 1895, was passed by the legislature of this state.

The foundation principles of the act are, that appointments to municipal offices or employments must be made according to merit and fitness, to be ascertained by competitive examinations, free to all; and that promotions from lower to higher grades in the public service must be made upon the basis of merit. That this is so, will appear from the examination of the various provisions of the act. Section 3 of the act provides for the classification of all the offices and places of employment in any city, which has adopted the Act, with reference to the examinations therein provided for, with certain exceptions; and that the offices and places, so classified by the Civil Service Commission, shall constitute the classified Civil Service of the city. Section 6 provides, that all applicants for offices or places in such classified service with certain exceptions, shall be subjected to examinations which shall be public, competitive and free to all citizens of the United States, with specified limita-

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tions as to residence, age, health, habits and moral character; that such examinations shall be practical in their character, and shall relate to those matters, which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include tests of physical qualifications and health, and when appropriate of manual skill; that no questions in any examination shall relate to political or religious opinions or affiliations. Section 8 provides that from these examinations, the Commission shall prepare a register for each grade or class of positions in the classified service of the city of the persons, whose general average standing, upon examination for such grade or class is not less than the minimum fixed by the rules of such commission, and who are otherwise eligible, and that such persons shall take rank upon the register as candidates in the order of their relative excellence as determined by examination, without reference to priority of time of examination. Section 9 provides, that the Commission shall, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination, and shall provide, "in all cases where it is practicable," that vacancies shall be filled by promotion; that all examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination; that it shall be the duty of the Commission to submit to the appointing power the names of not more than three applicants for each promotion having the highest rating. Section 10 provides that "the head of the department" or office, in which a position classi-

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fied under this act is to be filled, shall notify said Commission of that fact, and said Commission shall certify to the appointing officer the name and address of the candidate standing highest upon the register for the class or grade to which said position belongs, with a certain exception in regard to laborers; that the appointing officer shall notify the Commission of each position to be filled separately, and shall fill such place by the appointment of the person certified to him by said Commission therefor, etc. Section 34 provides that any person who shall willfully or through culpable negligence, violate any of the provisions of this act, or any rule promulgated in accordance with the provisions thereof, shall be guilty of a misdemeanor, and, shall, upon conviction thereof, be punished by a fine of not less than fifty dollars and not exceeding one thousand dollars or by imprisonment in the county jail for a term not exceeding six months; or both such fine and imprisonment in the discretion of the court.

In 1884 the State of Massachusetts passed a Civil Service Act, whose general provisions are substantially the same as those of the Illinois Act, now under consideration. The Supreme Court of Massachusetts being requested by the House of Representatives of that state to give their opinion upon the constitutionality of certain provisions of the act, held that the legislature has the constitutional right to provide for the appointment of Civil Service Commissioners, and to delegate them the power to make rules, not inconsistent with existing laws, to guide and control their discretion, and the discretion of the officers of the cities in whom the appointing power is vested; that the duty of determining and ascertaining the qualifications of such

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officers and servants cannot be performed directly by the legislature, but must be delegated to certain officers or agents; that it is not a delegation of power to enact laws, but merely a delegation of administrative power and duties; that there was no provision of the constitution which prevented the legislature from enacting that such rules, when duly made, should be binding upon the officers and citizens to whom they apply, and that they might be enforced by suitable penalties; that the power of the legislature to make or to authorize local laws for the administration of local affairs was beyond question. (Opinion of Justices, 138 Mass. Rep., 601.)

In 1883, the legislature of the State of New York passed a Civil Service Law, which is similar in most of its features to the Illinois Act. In Rogers v. Common Council of Buffalo, *supra*, it was held, that the provision of the act, which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion shall be taken from one party, does not amount to an arbitrary exclusion from office, or to a general regulation requiring qualifications not mentioned in the state constitution, and is not unconstitutional: and that a provision therein, which required an applicant for appointment to a position in a public office, to show his fitness therefor, was not an illegal test within the meaning of the constitution.

In the course of the opinion delivered by Mr. Justice PECKHAM in the latter case, he says: "Looking at it as a matter of common sense, we are quite sure that the framers of our organic law never intended to oppose a constitutional barrier to the right of the people

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through their legislature to enact laws, which would have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office so long as the means adopted to accomplish such end are appropriate therefor they must be within the legislative power. The idea cannot be entertained for one moment, that an intelligent people would have consented to so bind themselves with the constitutional restrictions on the power of their own representatives, as to prevent the adoption of any means by which to secure, if possible, honest and intelligent service in public office. * * * Statutes looking only to the purpose of ascertaining whether candidates for an appointive office are possessed of those qualifications, which are necessary for a fit and intelligent discharge of the duties pertaining to such office, are not dangerous in their nature, and in their execution, they are not liable to abuse in any manner involving the liberties of the people."

The Illlinois Act contains a similar provision to that in the New York Act, namely: that no more than two members of the Civil Service shall, at the time of appointment, be members of the same political party. Section 31 of the Illinois Act provides that no comptroller, or, other auditing officer of a city which has adopted the act, shall approve the payment of, or be in any manner concerned in paying any salary or wages to any person for services as an officer or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law, and is entitled to payment therefor. Section 32 provides that no paymaster, treasurer or

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other officer or agent of a .ity which has adopted the act shall willfully pay, or be in any manner concerned in payin any person any salary or wages for services as an officer or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law, and is entitled to payment therefor.

The New York Act provided, that clerks and other subordinates in the Civil Service of the state should be appointed or selected from the lists produced, as therein provided, after competitive examinations, and that it should be unlawful for the comptroller to pay the compensation of any clerk in the Civil Service, who had not been appointed pursuant to the provisions of the law, and whose name had not been certified to him by the Civil Service Commission. In People v. Roberts, 148 N. Y., 360, the facts showed that the relator was appointed to a certain position without having passed the Civil Service Examination, and that his name had never been certified to the comptroller by the ivil Service Commission, and that for that reason the comptroller refused to pay the claim. It was there held, that the relator was not entitled to a mandamus to compel the comptroller to pay him the salary attached to such position in the absence of a certificate from the Civil Service Commission that he had been duly appointed pursuant to the Civil Service Act; and the act was there held to be constitutional, the court saying: "The power of the legislature to enact the law, as it appears on the statute books has never been doubted or questioned." Again, in Chittenden v. Wurster, 152 N. Y., 345, which was an action brought by taxpayers of the City of Brooklyn to enjoin the

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fiscal officers of the city from paying the salary earned by them to certain employes, who were appointed to their positions without competitive examinations, it was held that the New York Act, with the exception of a provision which exempted certain soldiers and sailors from competitive examinations where the compensation did not exceed $4 per day, was not repugnant to the Constitution of the state. (See, also, Peck v. Belknap, 130 N. Y., 391; matter of Keymer, 148 N. Y., 219.)

The act passed by the legislature of Illinois on March 20, 1895, is not unconstitutional in requiring examinations as therein provided for, as tests for appointments to public office, nor in requiring promotions to be made in the manner therein specified, nor in attaching a penalty to the violation of the provisions of the act. The act does not delegate legislative power to the Civil Service Commissioners by authorizing them to make the rules therein provided for. In this state, when the General Assembly creates a municipal government, it has the power to provide the manner of filling the offices of such government. The legislature may select any means for the administration of the municipal government which it thinks best adapted to that end.

It may provide for the election of municipal officers by the people or may authorize any officers or persons to fill the offices by appointment. (People v. Morgan, 90 Ill., 558.) It has, therefore, the right to enact a law which provides that appointments to municipal offices or positions shall be made according to merit and fitness, and that such merit and fitness must be

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ascertained by competitive examination. In most instances before the passage of the Civil Service Act, the municipal officers, having the power to make appointments to office, removed their appointees at their own pleasure. It is certainly not a violation of the organic law to require them to conform to and obey regulations, which make merit and fitness the necessary qualifications for office. It is contended, however, by counsel for the respondent Kipley, that the act is unconstitutional and void upon the alleged ground, that it delegates to the Civil Service Commissioners the exercise of judicial functions. This contention rests upon the character of the provisions contained in sections 12, 14 and 33 of the act. Section 12 provides, that no officer or employe in the classified Civil Service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause upon written charges and after an opportunity to be heard in his own defense; that such charges shall be investigated by or before said Civil Service Commission, or by or before some officer or board appointed by said Commission, to conduct such investigation; that the finding and decision of such Commission or investigating officer or board, when approved by said Commission, shall be forthwith enforced by such officer; that in the course of an investigation of charges, each member of the Commission, and of any board so appointed by it, and any officer so appointed, shall have the power to administer oaths, and shall have power to secure by its subpœna both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigation. Section 14 provides, that

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the Commission shall investigate the enforcement of the act and of its rules, and the action of the examiners therein provided for, and the conduct and action of the appointees in the classified service in its city, and may inquire as to the nature, tenure and compensation of all offices and places in the public service thereof; and that in the course of such investigations each Commissioner shall have the power to administer oaths, and said commission shall have the power to secure by its subpœna both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigations. Section 33 provides, that any person who shall be served with a subpœna to appear and testify or to produce books and papers, etc., under the orders of the Commission in the course of such investigation above specified, and who shall refuse or neglect to appear or to testify, or to produce books and papers relevant to said investigation, as commanded in such subpœna, shall be guilty of a misdemeanor, and shall, on conviction, be punished as provided in section 34, which has already been referred to; that any Circuit Court of this state, or any judge thereof, either in term time or vacation, upon application of any such Commissioner, or officer, or board, may, in his discretion, compel the attendance of witnesses, the production of books and papers, and giving of testimony before the Commission, etc., by attachment for contempt, or otherwise, in the same manner as the production of evidence may be compelled before said court.

We regard the question of the constitutionality of the act, so far as its constitutionality is attacked upon the ground that there is a supposed delegation of

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judicial functions to the Civil Service Commissioners as settled by the case of Interstate Commerce Commission v. Brimson, 154 U. S., 447. The twelfth section of the act provided that the Interstate Commerce Commission should have power to require by subpœna the attendance and testimony of witnesses and the production of books etc., relating to any matter under investigation; that in case of disobedience to a subpœna, the Commission might invoke the aid of any Circuit Court of the United States in requiring that attendance and testimony of witnesses, and the production of books and papers and documents under the provisions of said section; that any of the Circuit Courts of the United States, within jurisdiction of which such inquiry was carried on, might, in case of refusal to obey a subpœna issued to any common carrier, subject to the provisions of the act, or other persons, issue an order requiring such common carrier or other person to appear before said Commission and produce books and papers, if so ordered, and give evidence touching the matter in question; and that any failure to obey such order of the court might be punished by such court as a contempt thereof. In the Brimson case, *supra*, it was held that the provisions of said twelfth section, as above set forth, were not in conflict with the Constitution of the United States, that the party subpœnaed to testify or to produce books and papers, was bound to obey the subpœna, if the testimony sought, and the books and papers called for, related to a matter under investigation which the Commission was legally entitled to investigate. The Constitution of the United States provides that "the judicial power shall extend to all cases in law and equity arising under the Con-

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stitution, the laws of the United States and treaties made, or which shall be made their authority * * * to controversies to which the United States shall be a party," etc. In that case, the Supreme Court of the United States held, that the issue, made before the Circuit Court upon the application of the Commission for an order to compel the giving of testimony or the production of books and papers, was a "case" or controversy within the meaning of the Federal Constitution, which authorized the Circuit Court to act; and that the judgment of the Circuit Court rendered in pursuance of such applications was none the less judicial in its character, because the effect of it was to aid an administrative body in the performance of the duties legally imposed upon it by Congress in execution of a power granted by the constitution. As we understand the Brimson case, it also holds that where an act of Congress made the refusal of a witness duly summoned to appear and testify before the Commission in respect to a matter rightfully committed to that body for examination, an offense against the United States, punishable by fine or imprisonment, or both, a criminal prosecution, or a proceeding by information, could be instituted against the party who had committed such offense.

The Constitution of Illinois (Art. 61, Sec. 12) provides that "the Circuit Courts shall have original jurisdiction of all causes in law and equity," etc.

In the Civil Service Act, the Commission is authorized to subpœna witnesses to testify and to produce books and papers in the investigation of a matter which is clearly within their power to investigate

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for the reasons already stated. This being so, upon the refusal of the witness to obey the subpœna, the application of the Commission to the Circuit Court for an order requiring such persons so to appear before the Commission and give evidence or produce books and papers, would constitute such a case as would authorize the Circuit Court to act. The judicial function is performed by the court, and not the Commission. The Commission is not authorized to punish the party for contempt, but the Circuit Court, upon the application of the Commission, makes the order to produce the papers and upon failure to obey the order; inflicts the punishment as for a contempt. There is here no delegation of the judicial functions to the Commission, but simply a provision for the exercise of judicial functions by the Circuit Court.

The views here advanced do not conflict with the decision of this court in Puterbaugh v. Smith, 131 Ill., 199, which latter case was decided before this question was passed upon by the Supreme Court of the United States in Interstate Commerce Commission v. Brimson, *supra*. It was held in the Puterbaugh case, that so much of a certain act entitled "Evidence" as authorized a judge in vacation to punish in a summary manner by fine and imprisonment, or fine or imprisonment, a person, who should refuse to obey a subpœna of a notary public to appear and have his deposition taken, or to subscribe his name to a deposition, was unconstitutional; but the decision in that case was placed upon the ground, that the witness there merely acted in contempt of the notary's authority and not in contempt of the authority of the Circuit Court. Here, however, the Civil Service Act does not provide

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for punishment of the party for failing to obey the subpœna of the Commission, but for failing to obey the order made by the Circuit Court. When the application is made by the Commission or Commissioners, the court is authorized to compel the attendance of witnesses, by attachment for contempt or otherwise, "in the same manner as the production of evidence may be compelled before said court."

The orderly course of the proceeding would require, that an order should be made requiring the witness to testify, and that it should appear that the witness refused to obey said order before the punishment for contempt could be inflicted upon him. The phraseology of section 33 involves the making of such order as a preliminary step, before the punishment is inflicted. We are of the opinion, that the act is not unconstitutional as delegating judicial power to the Commission but even if the provision authorizing them to make application to the Circuit Court in the manner stated, was unconstitutional it would not necessarily follow that the whole act should fall because of such unconstitutional provision. Where one provision in an act is in conflict with the Constitution, but is so independent of other provisions that, without it, the latter are complete and fully capable of execution, the act will be construed the same as if the void part had never been inserted. (Dupee v. Swigert, 127 Ill., 494.)

It is claimed by counsel for the respondent Kipley, that the law is unconstitutional, as violating those sections of the constitution which secure the right of trial by jury. The right of trial by jury is not violated by the provisions of the Civil Service Act, which pro-

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vide for the summoning of witnesses, and the requiring of such witnesses to testify, and to produce books papers, etc., and which further provide, that in the event of their failure to obey the order of the court in this regard, they shall be punished for contempt. The issue presented by these provisions is not one for the determination of a jury. It is an issue of law exclusively, and not of fact. In matters of contempt, a jury is not required by due process of law. (Interstate Commerce Commission v. Brimson, *supra*; Application of Clark, 65 Conn., 171.)

Counsel also contends that section 12, which provides for the trial of charges against appointees violates the constitutional right of trial by jury. This is said to be so, upon the alleged ground that the office, from which the officer or employe is to be removed, or discharged in case the charges presented against him are sustained, is with its attending emoluments, the property of the office holder; and that no man can be deprived of his property without a trial by a jury of his peers. This position is wholly untenable. A public office is not property, nor are the prospective fees of an office the property of its incumbent. An office is a mere right to exercise a public function or employment. It is not the subject of sale, purchase or incumbrance. The term "office" implies a delegation of a portion of the sovereign power of the government to the person filling the office. Its duties are to be performed for the benefit of the public and in the public interest. (19 Am. & Eng. Enc. of Law, 381, 382).

In Donahue v. County of Will, 100 Ill., 94, it was held that a law which authorized county boards to remove county treasure s from office for certain violation

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of their duties, was not unconstitutional; that the removal of an official from office was not a judicial act and in that case, could be performed by the county board. In the Donahue case, *supra*, the contention that, under the constitutional provision prohibiting any person to be deprived of his property without process of law, a county treasurer could only be deprived of his office by a trial and judgment in a court of law, was held to be wholly untenable. We there said: "It is impossible to conceive how, under our form of goverment, a person can own or have a title to a government office. Officers are created for the administration of public affairs. When a person is inducted into an office, he thereby becomes empowered to exercise its powers and perform its duties, not for his, but for the public benefit. It would be a misnomer and a perversion to say that an incumbent owned an office or had any title to it."

In The State v. Hawkins, 44 Ohio St., 98, the Supreme Court of Ohio said: "The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him as a public trust to be exercised for the benefit of the public." If the removal of a county official for cause does not involve the exercise of judicial power, then certainly the removal of a municipal officer is not the exercise of judicial power. (State v. Hawkins, *supra.*)

The legislature has the power to control the municipalities created by it. Such municipalities must look to the state for such charters of government as the legislature shall see fit to provide; and, while they have a right to manage their own local concerns and

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choose their own administrative and police officers, yet this right is subject to such exceptions as the legislative power of the state may see fit to make. (Cooley on Const. Lim., 6 Ed., pp. 203 *n*, 227, 231.) Therefore, the legislature may direct how municipal officers shall be elected or appointed by the cities and villages in the state, and how such officers may be removed. Moreover, the provisions of the Civil Service Act for the removal or discharge of officers or employes upon written charges are purely statutory provisions. The constitutional provision, that " the right of trial by jury as heretofore enjoyed, shall remain inviolate," was not intended to introduce the right of trial by jury into special summary jurisdictions unknown to the common law, and not providing for that mode of trial. (People v. Hill, 163 Ill., 186.)

It is further claimed that the law is unconstitutional as being special legislation. This contention also is without force, as the law itself provides for its operation only in those cities, which by a vote of the people may adopt it. Laws of this character are not obnoxious to the constitutional inhibition against special legislation. (People v. Hoffman, 116 Ill., 601.) The present law has been adopted by the people of the City of Chicago.

Counsel for respondent Kipley, also contends that section 35 of the act is unconstitutional. Section 35 provides that " if any person shall be convicted under the next preceding section, any public office or place of public employment, which such person may hold, shall, by force of such conviction, be rendered vacant, and such person shall be incapable of holding any office or place of public employment for the period of

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five years from the date of such conviction." We are inclined to agree with counsel, that the portion of this section, which makes the person therein referred to incapable of holding any office or place of public employment for the period of five years from the date of his conviction, is unconstitutional.

Section 8 of article 2 of the constitution of this state provides, that " no person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary," etc. The act seems to contemplate prosecutions for the violations of its provisions. No person can be held to answer for any crime, for which an infamous punishment may be imposed without presentment or indictment by a grand jury. a crime which subjects the party to a disqualification to hold office in case he is convicted of such crime, is an infamous crime. Disqualification from holding office, if inflicted as a punishment for crime, is an infamous punishment. (Ex parte Wilson, 114 U. S., 417.)

Here, section 35 of the act provides for punishing the party guilty of violating its provisions by disqualifying him from holding office. This is not a punishment by fine or imprisonment, otherwise than in the penitentiary, and is in addition to such punishment by fine or imprisonment in the county jail, or by both fine and imprisonment, as is specified, in section 34. So far, therefore, as the act provides for the infliction of punishment by a disqualification to hold office, where the prosecution is by information and not by indictment, it is in violation of section 8 of article 2 of the constitu-

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tion. It is true that section 35 provides that such disqualification shall only be for five years from the date of the conviction, but, as counsel have furnished us with no authority in favor of the position that a limitation of the disqualification to a period of five years is different from a disqualification where no such limitation had been fixed, and has presented us in the briefs with no reasons or arguments upon the subject, we assume that the disqualification for a limited period is as much an infamous punishment as though it was not subject to any such limitation. But the obnoxious feature, which thus exists in section 35, may be eliminated from the act without invalidating its other provisions. With the exception thus indicated, our conclusion is, that the act is not unconstitutional in any of the respects heretofore mentioned, and which have been called to our attention by counsel for the respondent Kipley.

Second. The demurrers of the petitioner to the answers and plea raise a further question as to the proper construction of certain provisions of the Civil Service Act. Section 3 of the act provides that " said Commissioners shall classify all the offices and places of employment in such city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in section 11 of this act. The offices and places so classified by the Commission shall constitute the classified Civil Service of such city, and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned." Section 6 provides that all applicants for offices in said classified service, except those mentioned in section 11, shall be sub-

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jected to examination," etc. The plain meaning of this section is, that the offices and places mentioned in section 11 are not to be classified under the act, and are excepted out of the operation of the provisions of the act. Section 11, which thus designates the officers excepted from the classified service is as follows: "Officers who are elected by the people, or who are elected by the city council pursuant to the city charter or whose appointment is subject to confirmation by the city council, judges and clerks of election, members of any board of education, the superintendent and teachers of schools, heads of any principal department of the city, members of the law department, and one private secretary of the mayor, shall not be included in such classified service."

The present controversy arises out of a difference of opinion between the petitioner and the respondents as to the meaning of the two clauses: "Whose appointment is subject to confirmation by the city council," and, "heads of any principal department of the city." Under ordinances existing at the time of the passage of the Civil Service Act, certain departments of the municipal government of the City of Chicago, known as the department of police, the fire department, the department of health, the department of public works, the department of buildings, and the department of law, were in existence and in operation, having been created and established by such ordinances. By the terms of such ordinances, and in pursuance of a practice which existed for many years, each of these departments had one head, and each of these heads was appointed by the mayor by and with the advice and consent of the city council. Thus, the ordinance

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in regard to the police provides as follows: "There is hereby created the office of superintendent of police who shall be the head of said department of police. The fire ordinance provides as follows: "There is hereby created the office of fire marshal, who shall be the head of the fire department." The health ordinance provides as follows: "There is hereby created the office of commissioner of health, who shall be the head of said department of health." The ordinance in regard to public works provides as follows: "There is hereby created the office of commissioner of public works, who shall be the head of the department of public works." The ordinance in regard to buildings provides as follows: "There is hereby created the office of commissioner of buildings, who shall be the head of said department of buildings." The ordinance in regard to law provides as follows: "There is hereby created the office of corporation counsel, who shall be the head of the law department."

These ordinances further provide, that there shall be certain subordinates or assistants for each of these departments, who are specifically named in the ordinance. By the terms of the ordinances, all of these subordinates or assistants, with a few exceptions, to be hereinafter mentioned, were appointed in each department by the head of that department, either subject to the approval and consent of the mayor, or without such approval or consent. Thus, the ordinance in regard to police provides as follows: "There is hereby established an executive department of the municipal government of the City of Chicago, which shall be known as the department of police, and shall

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embrace the superintendent of police, an assistant superintendent of police, a secretary of the department of police, a secretary to said superintendent, one inspector of police for each police division, one captain of police for each police district, and such number of lieutenants, sergeants, detective sergeants, sergeants of detectives, desk sergeants, patrol men, clerks, photographers, telegraphers and veterinary surgeons as has been or may be prescribed by ordinances."

The contention of the petitioner is, that the expression, "heads of any principal department of the city", as those words are used in section 11, means when the act is applied to the City of Chicago, the following officers, to wit: the superintendent of police, the fire marshal, the commissioner of health, the commissioner of public works, the commissioner of buildings, and the corporation counsel. On the contrary, the respondents who are Civil Service Commissioners, contend that the words "head of any principal department of the city" mean, not only the said officials who are designated as heads in the ordinances, but also certain subordinates or assistants named in the ordinances. For instance, in the present case, it is contended by the Civil Service Commissioners, that the assistant superintendent of police, the secretary of the department of police, and the inspectors of police, must be regarded as heads of the police department. The respondent Kipley, further contends that the captains of police shall be regarded as heads of the police department. The same contention is made in regard to certain of the subordinates and assistants in the other departments above named.

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Therefore, the question which is to be determined in this branch of the case is this: what was the meaning of the legislature when it provided in section 11, that "heads of any principal department of the city" should not be included in the classified service? The practice which has prevailed under a constitution or a statute for a long series of years unchallenged and unquestioned, can be resorted to as affording strong evidence of the meaning of any phrase or term used in such constitution or statute. (Bunn v. The People, 45 Ill., 397; Opinion the Justices, 138 Mass., 601.)

In determining the meaning of a statute, a court will have regard to existing circumstances, or contemporaneous conditions, and also to the objects sought to be obtained by the statute, and the necessity or want of necessity for its adoption. (Hawes v. City of Chicago, 158 Ill., 653.) It is conceded by counsel on both sides in their arguments, that the legislature passed the Civil Service Act with full knowledge of the ordinances of the City of Chicago, which designated each of the officers already named as the head of each department above mentioned The opinion of the corporation counsel, which is made part of the answer of the respondent Kipley, makes the following statement: "We find no difficulty in passing upon the question as to what are principal departments in the service of this city, as the ordinances of the city provide for such departments. They are the departments of public works, buildings, fire, health and police." The respondents, who are Civil Service Commissioners, by adopting the answer of the respondent Kipley, also adopt the statement as to what are the principal departments of the city. It is also admitted

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in the argument of counsel, that the appointment of all of the six officers above named is made subject to the approval of the city council. It is also conceded by counsel for the Civil Service Commissioners, that the word "heads" as used in section 11, should be given the meaning which it had at the time of the passage of the Civil Service Act.

The word "department" has a well understood meaning, and had been used in prior statutes, and in the city and village act itself at the time when the Civil Service Act was passed. Thus in section 3 of article 7 of the city and village act, the following words are used to wit: "Neither the city council nor the board of trustees, nor any department or officer of the corporation," etc.; in section 17 of the same article the city comptroller is authorized to require of all officers a statement of the condition and expenses of their respective offices or "departments"; section 2 of the act in regard to the police and firemen's relief fund, provides, that "The superintendent or chief officer of the police department, the fire marshal or chief officer of the fire department," and other officials, shall constitute the board therein named; so, also, in the act of 1887 in regard to the police pension fund, section 2 speaks of the "superintendent or chief officer of the police department." (1 Starr & Cur. Stat., 2 Ed., pp. 727, 731, 835, 838.) There can be no doubt that the words as used in section 11 were intended by the legislature to refer to heads of the principal departments, as they existed under ordinances then in force. At that time there was no principal department of the city government of the City of Chicago, which had more than one head. Each department had a single

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head. Counsel say that, in the clause "heads of any principal department of the city," the word "heads" is plural, and the words "any department" are singular and that, therefore, the legislature must have contemplated that there should be two or more heads in one department. In pursuance of this construction it is then contended that certain subordinate officers in each department, such as the assistant superintendent of police, the secretary of the police department, each police inspector and each captain of police may be regarded as one of the heads of the department of police. If it be true that, when the Civil Service Act was passed each principal department had only one head, and if it be also true, as is admitted, that the legislature had full knowledge of the ordinance giving one head to each principal department, then the legislature must have intended to refer to each single head of each principal department by the words used in section 11. If the legislature meant that only heads of a department should be excluded from the classified service, then, where a department had only one head, such single head would not be excluded. Such a construction cannot be accepted as correct. The intention evidently was, that the head or heads of any principal department should be excepted.

If there was only one head, such single head should be excepted; if there were two or more heads, they should be excepted. It might be that the legislature could or would create some department besides and outside of those existing at the time of the passage of the act, which should consist of several persons as heads, instead of one person. In such case, such heads would come within the meaning of section 11.

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But, so far as the City of Chicago is concerned, the departments at the time of the passage of the act had each only one head, and, therefore, the words used in section 11 must refer to such heads as then existed. In section 10 immediately preceding section 11, the legislature three times makes use of the expression "head of the department," or "the head of any department," making use of the singular number. Section 10 provides that "the head of the department," etc., shall notify the Commission of a vacancy. Therein "the head of the department" is authorized, under certain circumstances, with the consent of the Commission, to discharge a candidate. Therein, also, "the head of any department" is authorized under certain circumstances with the approval of the Commission, to make a temporary appointment. Section 10 also refers to "the "head of the department" as the appointing officer This feature of section 10 corresponds with the ordinances referred to, which make, "the head" of each one of the six departments above referred to the appointing officer of most of the subordinates in his department, with a certain limited number of exceptions. It cannot be that after the use in section 10 of the expressions which refer to one single head of a department, the legislature intended a different meaning, by the use of the words contained in section 11. The expression there used is merely a pluralizing of the expression used in section 10, so as to convey the idea that, where there were several departments, and one head in each department, there were heads of departments. The construction contended for by counsel as to the meaning of the words, "heads of any department of the city," would not only destroy and nullify

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the Civil Service Act itself, but would lead to confusion and uncertainty in its interpretation. If the expression "heads of any principal department" is not to be interpreted to have the meaning given to it in the ordinances in force when the act was passed, what rule of interpretation is to be adopted in determining who are the heads of any principal department, and how many heads there shall be? Counsel say that it must be determined who are heads by applying certain tests. It is said that where an employe is authorized to exercise control in the absence of the chief officer of the department, such employe ought to be considered a head. There is nothing in the act which justifies the application of any such rule, in order to determine who are the heads. It is also said, that where an employe has charge of the hiring and employing of a large number of men, and the expenditure of large sums of money and is to be appointed only with the mayor's concurrence, and whose position is next to that of the chief of the whole department, such an employe must be considered a head of the division or department under his supervision.

There is nothing in the act, which justifies the application of any such test as is thus indicated. It is also said, that where any employe has confidential and business relations with the chief officers in any branch of the city service, he is to be deemed a head. This test also is without sanction in any of the terms of the act. All these tests ignore the fact that the "heads" referred to must be the heads of "any principal department" not a head of a division, or a department under the supervision of a subordinate. The "principal departments" are limited in number, being

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either six departments or seven departments, if the department of finance is included, and each of such departments, as has been already stated, has only one head.

If the construction contended for by counsel is correct, then, when section 10 authorizes "the head of the department" to notify the commission of a vacancy which one of such heads is to give such notice? and why is not the direction that "the heads of the department" should give the notice, instead of the direction that "the head" thereof should give it? The construction thus contended for would prevent the fulfillment of the object contemplated by the act itself. If it be once held, that there can be other "heads of any principal department" than those existing in the ordinances at the time the act was passed, then new heads may from time to time be created by the common council, or the appointing officers; and every foreman who has a squad of men at work under him, will be considered the head of a department. The object of the law is to provide for appointment to office upon the basis of merit and fitness, as ascertained by competitive examinations which are open and free to all. But if the doctrine is to prevail, that new heads of any principal department may be created whenever the exigencies of politics or the demands of partisan service require it, appointments upon the basis of merit and fitness will soon cease to be made. In addition to this, the act contemplates that promotions shall be made from one grade of the Civil Service to another upon the basis of ascertained merit and seniority in service and examination. If, however, every officer, who has a number of subordinates under him, is to

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be regarded as the head of a principal department, there can be no opportunity for promotion. If all are heads and all thus occupy the highest grades, there will be no lower grades from which subordinates can rise by promotion. Thus, the intention of the legislature in passing the act to make both original appointments and subsequent promotions, depend upon merit, and upon merit as ascertained by examinations, will be defeated. It is well settled, that courts will construe an act of the legislature, so as to give effect to the plain intention of the body, as embodied in the act. (Soby v. The People, 134 Ill., 66.) In so far as the administration of the Civil Service Act is dependent upon the action of the judicial department, "it is entitled to, and doubtless will, receive a fair and liberal construction, not only according to its letter, but its true spirit and the general purpose of its enactment." (People v. Roberts, 148 N. Y., 360.)

But section 11 also says that officers "whose appointment is subject to confirmation by the city council" shall not be included in the classified service. Counsel say, that the heads of the principal departments, as created in the ordinances already referred to, are officers whose appointment is subject to confirmation by the city council. It is, therefore, argued that if the words "heads of any principal department of the city" refer only to the single heads already referred to, then section 11 is subject to the criticism of a mere repetition in the matter of the excepted class. The theory of counsel seems to be this: when section 11 said that officers, whose appointment is subject to confirmation by the city council, shall not be included in the classified service, it said thereby that the head

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of each principal department, as named in the ordinances, should not be included; and that, this being so, when it afterwards used the expression "heads of any principal department of the city," it merely repeated an exception which had been already made, if the construction contended for by the attorney general is correct. It is true that each head of each principal department comes under both designations in section 11, to wit: the designation "whose appointment is subject to confirmation by the city council," and also the designation "heads of any principal department of the city." But the same is true of several other officials mentioned in section 11. Thus, the section mentions judges and clerks of election. Judges and clerks of election are included in the previous expression, to wit: "Officers * * * who are elected by the city council pursuant to the city charter." This is so because section 9 of article 4 of the City and Village Act provides, that the city council shall appoint the judges and clerks of election. It may be said, therefore, that the mention of judges and clerks of election in section 11 is a mere repetition of the designation of those officials, which had already been made under the designation of officers elected by the city council pursuant to the city charter. Section 11 mentions as persons not included in the classified service "members of any board of education." But "members of any board of education" are included in the previous designations of officers elected by the people, and of officers whose appointment is subject to confirmation by the city council. This is so, because section 2 of article 6 of the school law provides that, in school districts having a population of

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not over 100,000 inhabitants, there shall be elected a board of education, while section 17 of that act provides that in cities having a population exceeding 100,000 inhabitants, the board of education shall be appointed by the mayor by and with the advice and consent of the common council. (Starr & Cur. Stat., 2 Ed,. pp. 3691, 3695.) So, also, in reference to members of the law department as mentioned in section 11, the corporation counsel who is the head of that department, is an official whose appointment is subject to confirmation by the city council.

Section 11 designates certain officers with reference to the mode of their appointment, to wit: election by the people or election by the city council, or appointment subject to confirmation by the city council. It then proceeds to designate certain officials, who may be selected by one or more of the three modes already specified. The fact, therefore, that the mention of "heads of any principal department of the city" is a repetition of a class previously designated has no particular significance, except in the light of the views hereafter expressed upon that subject.

It is a well settled rule of construction, that, where there are two provisions, one of which is general and designated to apply to cases generally, and the other is particular and relating to one subject, the particular provision must prevail, and must be treated as an exception to the general provision. (Dahnke v. The People, 168 Ill., 111.) Section 3 provides that the Commissioner shall classify all the offices and places of employment in the city with reference to the examinations, provided for, except the offices and places mentioned in

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section 11; and further provides that no appointment to any of such offices or places shall be made except under and according to the rules provided for in the act. When these words of section 3 are applied to section 11, section 11 means that all officers and employes of "any principal department of the city," except the "head" or "heads" thereof, shall be included in the classified service.

This is a broad and general direction, but there is an exception to it. Wherever there is any officer, whose appointment is subject to confirmation by the city council, provided the office filled by him had been created and was in existence when the act was passed, such officer is not to be included in the classified service, even though he be a subordinate in one of the principal departments of the city. The same is true, if such officer is one elected by the people, or elected by the city council. Thus, in the department of law the ordinance provides that that department shall embrace the corporation counsel, the city attorney, the prosecuting attorney, and such number of assistants and clerks as the city council may by ordinance see fit to prescribe and establish. The corporation counsel is made the head of the law department, but the city attorney is an officer who is elected by the people. He, therefore, is not included in the classified service. So, in the ordinance in regard to the department of health it is provided that the department shall embrace the commissioner of health, the superintendent of police and others. Although the commissioner of health is made the head of the department of health, yet, as the superintendent of police is an official whose appoint-

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ment is made by the mayor subject to the confirmation by the city council, the superintendent of police is an officer who is not included in the classified service, Still, again, the ordinances create a department of finance, of which the city comptroller is made the head. It is provided that this department of finance shall embrace the city comptroller, the city treasurer. and others. But as the city treasurer is an officer who is required by the statute to be elected by the people, he is not included in the classified service. We are inclined to the opinion that, if any member of any principal department of the city is an official whose appointment is made by the mayor subject to confirmation by the city council, he is not to be included in the classified service. notwithstanding he may not be made the head of the department. Thus it would appear that the two clauses, "officers whose appointment is subject to confirmation by the city council," and heads "of any principal department of the city," should be construed together, in order to make them consistent with each other.

It seems to be contended by counsel for the respondent Kipley, that, inasmuch as officers whose appointment is subject to confirmation by the city council are excepted from the operation of the act, the common council may, by ordinance, increase the number of officers so to be appointed, and thereby increase the number of exceptions under section 11.

Accordingly, the plea filed by the responden: Kipley, sets up the ordinance of June 28, 1897, which is fully described in the statement of facts preceding this opinion.

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That ordinance requires that certain subordinate officers or employes in certain of the principal departments of the city government shall be "designated as heads of principal departments," as said term is used in section 11 of the Civil Service Act, "and shall be nominated by the mayor and shall be confirmed by the city council."

This ordinance was passed by the city council of Chicago after the present proceeding was commenced in this court, and after the petition and answers had been filed and demurred to. If it is a valid ordinance and has the effect which it was intended to have, it it will certainly nullify and make worthless the Civil Service Act.

Its passage is not defended or indorsed by the respondents, who are Civil Service Commissioners. We have held, that ordinances passed by the common council must be reasonable in order to be valid, and that they must spring from an honest exercise of legislative discretion. (Bloomington v. C. & A. R. R. Co. 134 Ill., 451; Hawes v. City of Chicago, *supra*.)

The Civil Service Law is binding as well upon the common council of the city, as upon the other persons mentioned in the act. (Peck v. Belknap, 130 N. Y., 394.) The ordinance assumes to define the meaning of the words "heads of any principal department of the city" as those words are used in the Civil Service Act. The power to interpret and construe a statute, or to define the meaning of the terms therein, rests with the courts, and not with the legislature, and certainly not with a subordinate legislative body like the common council of a city. (23 Am. & Eng. Enc. of

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Law, 449.) The ordinance does not create any new office or any new department, but simply provides that certain subordinate officials in departments already created shall be designated as heads of principal departments, and shall be appointed in a different manner from that in which existing ordinances require them to be appointed. Such an ordinance is invalid as being beyond the power of the common council to pass it, in view of the provisions of the Civil Service Act, and of the City and Village Act. As has already been stated, sections 3 and 11 of the Civil Service Act provide in effect, that all the subordinate officers and employes of any principal department of the city shall be embraced within the classified service. The ordinance of June 28th, provides in effect, that certain designated subordinates in the principal departments of the city government shall not be included in the classified service. The ordinance, is, therefore, directly in the teeth of the statute.

This will further appear from a consideration of the meaning of sections 2 and 3 of article 6 of the City and Village Act, as those sections bear upon, and have reference to, the ordinances hereinbefore mentioned, which existed at the time of the passage of the Civil Service Act.

Section 2 of said article 6 provides that "The city council may in its discretion from time to time, by ordinance, passed by a vote of two-thirds of all the aldermen elected, provide for the election by the legal voters of the city, or the appointment by the mayor with the approval of the city council, of a city collector, a city marshal, a city superintendent of streets, a corporation counsel, a city comptroller, or any or eithe

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of them, and such other officers as may by said council be deemed necessary or expedient. The city council may, by a like vote, by ordinance or resolution, to take effect at the end of the then fiscal year, discontinue any office so created, and devolve the duties thereof on any other city officer," etc. Section 3 provides, that all "officers of any city, except where herein otherwise provided, shall be appointed by the mayor (and vacancies in all offices except the mayor and aldermen shall be filled by like appointment) by and with the advice and consent of the city council. The city council may, by ordinance not inconsistent with the provisions of this act, prescribe the duties and define the powers of all such officers, together with the term of such office," etc. (1 Starr & Cur. Stat., 2 Ed., pp. 721, 722.) Said section 2 provides for the creation of certain offices by ordinance passed by a vote of two-thirds of the aldermen elected. Section 2 gives the council power to provide, in the manner therein stated, for such other offices than those specifically mentioned, as may by said council be deemed necessary or expedient. It thus provides for officers not specifically named in the section, and whose designation cannot be determined until the ordinance therein provided for is passed. In other words the second section gives the common council power to provide in a certain way for the election or appointment of officers whose designation and duties are not mentioned in the statute, but whose designation and duties are to be fixed by ordinances to be subsequently passed. The object of the section cannot be accomplished without action on the part of the city council.

Section 3 merely provides for the mode of appointing

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individuals to the offices created by section 2. The officers referred to in section 3 are the officers to be created by ordinance, as provided in section 2. For example, the common council of the City of Chicago, under the authority contained in section 2, provided for the appointment by the mayor with the approval of the city council, of a superintendent of police. When the present mayor appointed the respondent Kipley, to the position of superintendent of police, he appointed him under the authority contained in section 3. Section 2 creates the office, section 3 provides for the appointment of an individual to the office so created. The ordinance mentioned in section 2 creating the office must be passed by a two-thirds vote of the aldermen elected, but the confirmation provided for by section 3 may be accomplished by a majority vote.

From what has been said, it is apparent, that the words "whose appointment is subject to confirmation by the city council" as used in section 11 of the Civil Service Act, refer to officers whose appointment was subject to such confirmation at the time the Civil Service Act went into force. The words used are "is subject," not "may be subject" by some future action of the council. Section 11 refers, by the use of the words last quoted, to officers whose positions had then already been created, by virtue of the power contained in section 2 of article 6 of the City and Village Act. It could not refer to officers whose positions might thereafter be created, because in that view, there were no officers whose appointment was subject to confirmation by the city council. The appointment of an officer, whose position has not yet been brought into being, cannot be subject now and at the present

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time to confirmation by the city council. The words in section 11 refer to cases where the council had already acted under said section 2 of article 6, In the case at bar the city council of Chicago had already passed ordinances providing for the appointment by the mayor subject to confirmation by the city council, of the heads of the fire, police, public works, buildings, health and law departments. The appointments of these officials had been provided for when the act went into force, and they are referred to by the terms of section 11. They were then existing officials, and were made exempt from the operation of the Civil Service Law. It is true that, under section 2 the common council might discontinue an office created under section 2, where such an office was unnecessary, in order to devolve its duties upon some other officer.

But the common council had no right to pass an ordinance, providing that subordinates in a department already created should be elevated to be the heads of such department. To hold that it had such right would be to hold that it could nullify the Civil Service Act by making every person holding a position, however subordinate, an official whose appointment should be subject to confirmation by the city council, thereby taking his appointment out from the operation of the Civil Service Act. To construe the act, so as to permit such a result as this would be to construe it in opposition to the intention of its authors and not with a view to carrying out such intention

The Civil Service Act provided that all laws or parts of laws, which are inconsistent with it or with any of its provisions, were thereby repealed. Hence, any pro-

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visions, either of the City and Village Act, or of any ordinance of the city, which provided for a different mode of appointment than that specified in the Civil Service Act, was repealed, except so far as it might come within the exceptions named in section 11.

It is to be noted that the words "in all cases where "it is practicable," are only used in the act in reference to the subject of promotion. The New York Constitution and the Civil Service Acts passed by the legislature of that state provided that appointments and promotions in the Civil Service should be made according to merit and fitness, to be ascertained "so far as practicable," by examinations. (People v. Roberts, *supra;* Chittenden v. Wurster, *supra.*)

But in the Illinois Civil Service Act, this word "practicable" is not used in connection with the subject of examinations.

Our conclusion upon this branch of the case is, that the assistant superintendent of police, inspectors of police, and captains of police, are not excepted from the operation of the Civil Service Law, by the provision of section 11, or by any other provisions in the act. The same is true as to all positions in the other principal departments of the city government herein mentioned, which are of a lower grade than the chiefs or heads of those departments or which are subordinate to such chiefs or heads. This statement, however, is subject to this qualification, namely: that, wherever, at the time the Civil Service Act was passed, an office or place of appointment was one, the appointment to which was to be made by the mayor, subject to confirmation by the city council, it is within the exception

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named in section 11 and is excluded from the classified service.

Third. Certain objections are made to the petition as a pleading. It is contended that the demurrer to the answers should be carried back to the petition. We do not regard the petition as defective in any essential particular. The right of mandamus lies to compel the performance of a public duty, or in the enforcement of a public right, and, in such case, no demand and refusal need be shown. (Brokaw v. Commissioners, 130 Ill., 482; People v. Commissioners, 127 Ill., 613.) The respondents, who are made parties to the petition, are the only necessary parties. (Dement v. Rokker, 136 Ill., 174.)

The answers neither admit nor deny some of the averments in the petition. Wherever an averment of the petition well pleaded is not expressly denied, in the answer, it must be taken to be true. (C. & A. R. R. Co. v. Suffern, 129 Ill., 274.) A petition for mandamus must set forth a clear right on the part of the relator to have the act performed. It must also show that it is the plain duty of the party against whom the remedy is sought, to act in the premises. (People v. Mt. Morris, 145 Ill., 427; People v. Elgin, 66 Ill., 507.)

We are of the opinion that, in this case, a clear right is shown on the part of the relator and a clear duty on the part of the respondents. It was the duty under the act of the respondent Kipley, to notify the Commissioners of vacancies that existed in his department under section 10 of the act, and it was the duty of the Civil Service Commissioners to certify to him the names and addresses of the candidates to be appointed to fill the vacancies in the manner prescribed in the act.

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Accordingly it is ordered that the writ of mandamus issue to the respondents, the one to give the notice and the others to make the certification, as prayed in the petition.

Writ awarded.

PHILLIPS, C. J. dissenting:

I do not concur in all that is said in this opinion nor in the judgment announced.

The phrase "heads of any principal department" would include more than a single official who is an officer provided for by the city and village act.

Included in that phrase, would be an employe, who, in the absence of the chief officer, would, under his duties, have control of the department; as it also would include an employe having charge of a distinct branch of the service employing a large number of men.

Any head of a division having duties to discharge which causes him to be directly responsible to the mayor or city council for the manner in which he supervises and cares for the service intrusted to him, and who has confidential and personal relations to the chief officer in such service, or to the mayor and city council would, in my opinion, be included in the phrase "heads of any principal department," as used in Par. 11 of the act, and not subject to classification under Par. 3 of that act.

In my opinion the writ should not be awarded.

BOGGS, J., dissenting:

I concur in the view it was within the constitutional power of the General Assembly to enact the "Act to regulate the Civil Service of cities," but join Mr. Chief Justice Philips in dissenting to the conclusion that

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the law-making power intended that the phrase "heads of any principal department of the city," incorporated by the General Assembly in the 11th section, should be construed by the court to mean the "head" or chief officer only of such department.

The appointment of the "head" or chief officer of "each principal department of the city" is subject to confirmation by the city council, and the General Assembly having declared by a prior phrase in the same section that "officers whose appointment is subject to confirmation," should be exempted from the operation of the act, it is not reasonably to be presumed or supposed the latter phrase was inserted merely as a repetition of the former, but that it was employed for the purpose of exempting from the effect of the act other officers than those included in the former exempting clauses.

The construction given the phrase under consideration simply refuses to accord it any meaning or force whatever and in effect expunges it from the act, for it is clear the section, as construed by the court, would be given the same effect if the phrase in question did not appear at all.

The rejection of a portion of an act is only to be resorted to as a desperate and heroic remedy necessary to be employed for the preservation of the act itself.

It is a universal rule of construction so frequently declared that the citation of authorities is superfluous that the words of a statute of common use are to be taken in their natural, plain, obvious and ordinary signification, "and that a plain, common sense interpretation of such words are to be accepted rather

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than a refined and technical grammatical construction." It must be conceded the meaning of the words "heads of a department" is not, in popular and common acceptation, at all a matter of doubt. It does not mean the "head" alone of the department, but the chief or principal governing officers thereof.

The meaning of the word in this instance is the word itself, and there is no occasion to invoke the refinements of construction to defeat it."

After the rendition of the above opinion, and on January 12, 1898, a petition for rehearing was filed on behalf of the respondent Kipley, superintendent of police, but none was filed on behalf of the respondents, Kraus, Winston or Washburne, Civil Service Commissioners.

A writ of error was allowed by Mr. Chief Justice Phillips, and an order approving the bond of said Kipley, made on January 17, 1898.

A citation issued, returnable on the 18th day of February, 1898.

A copy of said petition is hereto annexed as Exhibit "A."

On the 4th day of February, 1898, a rehearing was denied.

The salient facts are clearly stated in the opinion of the Supreme Court of Illinois, but we are, perhaps, justified in calling attention to a few matters shown by the record, and not specifically, or in detail, set forth in the opinion, and among them:

First. The prayer of the original petition for mandamus, which was as follows:

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"Petitioner therefore prays that leave may be granted "to file this petition, and that a summons or rule may "issue to the said Adolf Kraus, Dudley Winston, "Hempstead Washburne and Joseph Kipley, to an- "swer the same, to be made returnable to the present "term of this court, and that a writ of mandamus may "issue to the said Adolf Kraus, Dudley Winston and "Hempstead Washburne, Civil Service Commissioners "as aforesaid, and Joseph Kipley, superintendent of "police of the City of Chicago, as aforesaid, directing "and commanding the said Joseph Kipley to notify "said Civil Service Commissioners of all vacancies "existing in the positions of assistant superintendent "of police, inspectors of police and captains of police "in said City of Chicago, and commanding said Civil "Service Commissioners to submit to said Joseph "Kipley as such superintendent of police, the names "of not more than three applicants for promotion for "each vacancy from the grade next below that in "which such vacancy or vacancies exist and that "your petitioner may have such other or further relief "as the nature of the case may require."

Second. The separate answer of Kipley, as superintendent of police, in which he sets up among other things, as follows:

"Third That although an act entitled 'An Act to "regulate the Civil Service of Cities' was passed and "approved substantially as stated in said petition, "and although the same was afterwards submitted to "a vote of the electors of said city, and although the "electors of said city by a large majority of votes adopt- "ed the said act as set forth in said petition, yet these "respondents are informed by counsel learned in the

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"law, as they here insist, *that the said act was and* "*is unconstitutional and void*, for the following reason: "*that the said act purports to confer judicial powers* "*and authority to make and enforce judgments and* "*decisions of a non-judicial body described and set* "*forth in said act as the 'Civil Service Commission,'* "*for which reason*, this respondent submits whether "he, in the capacity in which he is herein and here- "by impleaded, should act further, especially in the "performance of the matters and things which it is al- "leged in said petition he has not done and not per- "formed, and whether he should make any further "answer unto the said petition, and he claims the "same benefit and advantage as to matters and "things hereinbefore stated and set forth, as if he had "demurred to the said petition."

There was no other reference in the answer of Kipley to the unconstitutionality of the law.

To it a special demurrer was filed on the 16th day of June, 1897.

On the 10th of July, 1897, after, as will be noted, the filing of the answer by Kipley and the demurrer thereto by the People, and in vacation, he filed a plea *puis*, setting up the passage of the ordinance of June 28, 1897, known as the Power's ordinance, and its approval by the mayor on July 1, 1897.

A motion to withdraw this answer and plea and for leave to file an amended and supplemental answer was made on the 7th day of October, 1897, and denied on the following day. The motion is reported in Peo. v. Kipley, 167 Ill., 638, and the grounds of denial were that no showing had been made or reasons filed in support of the motion.

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To the pleas *puis* a demurrer was filed on the 18th day of October, 1897.

A separate answer by Kraus, Washburne and Winston, Civil Service Commissioners, had been filed on June 15, 1897, to which a demurrer had been interposed. They did not join in the petition for the writ of error. (See Exhibit "A.")

BRIEF.

I.

THE PETITION FOR A WRIT OF ERROR DID NOT RAISE A FEDERAL QUESTION.

A certificate of a chief justice of the highest tribunal of a state is of itself not sufficient to originate a question of that character.

Felix v. Scharnweber, 125 U. S., 54.

II.

NO FEDERAL QUESTION WAS INVOLVED.

The petition for the writ of mandamus did not seek to disturb Kipley, Kraus, Washburne, Winston, or any person who could be ascertained, in the incumbency of their offices. The defendant in error asked that directions issue to the chief of police and civil service commissioners in the performance of public duties prescribed by the civil service act. If the effect of such directions should be the cause of disappointment thereafter to any person holding or seeking a position under the municipal authorities, he

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would be at liberty to waive his supposed grievance, or, if he should deem it sufficient, at equal liberty to bring his suit.

"It is well settled that in order to give this court juris-"diction to review a jud'gment of a state court against a "title or right set up or claimed under a statute of or an "authority exercised under the United States, that title or "right must be one of the plaintiff in error and not of a "third person only."

Giles v. Wheaton, 134 U. S., 645.

III.

NO FEDERAL QUESTION WAS RAISED.

"The jurisdiction of the United States Supreme Court "to re-examine the final judgment of a state court cannot "arise from inference but only from averments so distinct "and positive as to place it beyond question that the party "bringing the case up intended to assert a Federal right."

Oxley Company v. Butler Co., 166 U. S., 648.

Levy v. Superior Court, 167 U. S., 175.

Kipley's claim that the Illinois Civil Service Act "was "and is unconstitutional and void for the following *rea-*"*son*, that the said act purports to confer judicial powers "and authority to make and enforce judgments and decis-"ions of a non-judicial body described and set forth in the "said act as a Civil Service Commission," did not draw in question any statute of the state upon the ground that it was repugnant to the Constitution of the United States, or constitute a claim of right, title, privilege or immunity under that constitution.

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We quote from the opinion of Mr. Chief Justice Fuller, in Miller v. Cornwall R. R. Co., Supreme Court Reporter, November 15, 1897, Vol. 18, p. 34: "We "have no jurisdiction on a writ of error to a state court "to declare a state law void on account of its collision "with a state constitution; and it was long ago held that "where it was objected in the state courts that an act of "the state was 'unconstitutional and void,' the objection "was properly construed in those courts, as raising the "question whether the state legislature had the power, "under the state constitution, to pass the act, and not as "having reference to any repugnance to the Constitution "of the United States. (Porter v. Foley, 24 How., "415.)"

It is true that the state court discusses the question of constitutionality, but as the opinions of the majority and minority judges all show, with reference only to the Constitution of Illinois.

The opinion is part of the record;

Eagan v. Hart, 165 U. S., 188,

and may be looked into to ascertain whether the decision of a Federal question was necessary to the decision of the case

Eagan v. Hart, *supra*.

Unless the decision of a Federal question by the State Court was essential to a decision of the case, even though one was passed upon, this court is without jurisdiction to review it.

Eustis v. Bolles, 150 U. S., 361.
Hammond v. Conn., &c., *ibid.*, 633.

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The question really necessary to be decided as to Kipley, as the Civil Service Commissioners especially disclaimed disputing the constitutionality of the Civil Service Act, was the validity of the ordinance of June 28, 1897, because the plea *puis* by which it was set up operated as a waiver or withdrawal of the answer.

If it be said that an unconstitutional act would not be enforced or that a court should not lend its aid to enforce it by mandamus or other process the answer here is that the judgment of the state court is sufficient. Until the announcement of the opinion of that court plaintiff in error Kipley was content to abide its judgment.

After the decision in People v. Kipley, *supra*, he allowed the cause to be submitted without objection, his counsel participated in the argument, and he even caused to be filed a petition for rehearing, although he afterwards presented to the chief justice a petition for writ of error and the same was allowed.

Again, this court and the Supreme Court of Illinois are in accord upon the following proposition: "Statutes "constitutional in part only will be upheld as to what is "constitutional, if it can be separated from the unconsti "tutional provisions."

Syllabus, Presser v. Illinois, 116 U. S., 152, being the Illinois Militia Act case.

The case as made in the state court, as already stated, did not involve a forfeiture, and the answer of Kipley did not so claim. He simply asserted that the act was unconstitutional, because it attempted to delegate judicial powers to a non-judicial body.

The claim (considered for the moment as addressed to the United States Constitution) goes to the act as a whole,

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and, unless that act in all its parts is void, or the bad so intermingled with the good that they cannot be separated and must fall together, must fail.

To make an analysis of the act to regulate the civil service of cities, R. S. Ill., Ch. 24, Sec. 446, *et seq.*, would extend this brief improperly, but the court will see that the sections coming within the averments of the answer of unconstitutionality are not vital or essential to the act or so interwoven with the scheme of it as to be inseparable.

IV.

WAS THE ALLOWANCE OF THE WRIT OF ERROR PREMATURE.

The judgment of the state court was rendered December 22, 1897, and was final in its nature, but the respondents had the right to apply for a rehearing. Kipley gave notice of intention within fifteen days, or before January 6, 1898.

Rules, Ill. Supreme Court, 156 Ill., 648, which was allowed. He filed a petition for rehearing, and thereby clothed the state court with power to modify or annul its judgment. He filed his petition for writ of error, it was allowed and bond was filed. That court acted on the petition for rehearing on February 4, 1898.

The question is, was not the final order or judgment under the rules of this court, as applied to this case, the judgment of February 4, 1898, and not that of December 22, 1897? Kipley may well be taken to have waived his writ of error by not withdrawing his petition for rehearing, or the action of the court as such on February 4,

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1898, in denying a rehearing may be considered a vacation of the allowance of the writ of error by the chief justice on the 17th day of January, 1898.

Respectfully submitted.

EDWARD C. AKIN,
Attorney General of Illinois.
GEORGE W. SMITH,
FRANK P. BLAIR,
MURRY NELSON, JR.,
Counsel for Defendant in Error.

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EXHIBIT "A."

To the Honorable Jesse J. Phillips, Chief Justice:

Your petitioner, Joseph Kipley, by Charles S. Thornton, his attorney, respectfully represents that he is the respondent above named and that feeling aggrieved by the final order or judgment rendered and entered against him by the Supreme Court of Illinois, in the above entitled cause, on December 22, 1897, now comes and with him brings the complete transcript of the record therein in said court and respectfully alleges that it appears therein that there is manifest error on the part of the Supreme Court of Illinois in this:

First. That said court erred in refusing to grant to your petitioner leave to amend his answer herein and to withdraw his plea *puis darrein continuance*, so as to more fully present the matters and things as therein stated and especially the constitutional questions wherein and whereby rights, titles, privileges and immunities as against the petition of the relator herein and under and by virtue of the Constitution of the United States were respectively specified, set forth and claimed.

Second. That said court erred in not receiving the amended answer of your petitioner and in not considering the same at the hearing.

Third. The court erred in refusing to quash the rule to show cause issued herein, for want of jurisdiction.

Fourth. The court erred in granting the prayer of relator's petition and in making the order or rendering the judgment of date December 22, 1897, awarding a

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peremptory writ of mandamus as against your petitioner, and among other, for the following reasons:

1. Because the Civil Service Act, being an act of the General Assembly of the State of Illinois, entitled "An Act to regulate the Civil Service of Cities" (Approved March 20, 1895. In force July 1, 1895), abridges and privileges and immunities of citizens of the United States, in that it renders all such citizens who do not apply for office or for place of employment ineligible to appointment or for selection therefor, whereas it is the right and privilege of every citizen to hold office and serve the public.

2. The said act of March 20, 1895, deprived a duly elected and qualified officer of the right to select his subordinates and provide the requisite agencies for performing his official duties, thus abridging the rights, privileges and immunities belonging and guaranteed by its constitution to every citizen thereof.

3. The said act of March 20, 1895, provides for the invasion of the rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.

4. The said act of March 20, 1895, purports to prescribe for the criminal trial of public officers for nonfeasance, for misfeasance, for malfeasance in office, and for the infliction of the penalties therefor, of deprivation of office, of fine, of imprisonment, and incapacity to hold office thereafter, by a non-judicial body, and in such manner that the accused shall not enjoy the right to a speedy and public trial by an impartial jury, of the state or district wherein the crime shall have been committed; and without informing the

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accused of nature and cause of the accusation, and without confronting the accused with the witnesses against him; and without permitting the accused to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

5. That said act denies to the citizen the freedom of political action making it plainly penal for the citizen to take part in party politics.

6. That said act of March 20, 1895, provides for the creation and maintenance of an office holding class, at the expense of the people who are excluded therefrom by the operation of the said act.

7. And generally said act of March 20, 1895 is directly in contravention of the right of that clause of the United States Constitution, which prescribes that:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws,"

so that the said record presents all said several questions each of which is peculiarly within and for the jurisdiction of the Supreme Court of the United States, pursuant to the statutes of the United States in such case made and provided especially where as here shown in and by said record, titles, rights, privileges and immunities are specifically set forth and claimed,

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and where the decision of the highest court of a state to which the case can be taken is in denial of such titles, rights, privileges and immunities.

Wherefore, your petitioner would respectfully ask your Honor to grant unto him and under and pursuant to the acts of Congress to this and allow a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Illinois, that the said record may be reviewed and the said error therein may be corrected and speedy justice done in the premises, and that said writ of error may be made a supersedeas; and as in duty bound your petitioner will ever pray.

JOSEPH KIPLEY,
Respondent.
By CHAS. S. THORNTON,
His Attorney.

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